

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

MAR 22 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments) MB Docket No. 03-12
FM Broadcast Stations) RM - 10627
(Charles Town, West Virginia)
and Stephens City, Virginia)

To: Office of the Secretary
Attn: Assistant Chief, Audio Division
Media Bureau

OPPOSITION TO MOTION

Cleveland Radio Licenses, LLC ("CRL"), licensee of WKSI-FM (formally WXVA-FM), Charles Town, West Virginia, by its counsel, hereby opposes the "Motion for Leave to Supplement" filed by Mid Atlantic Network, Inc. ("Mid Atlantic") in the above captioned proceeding.¹

1. On December 5, 2003, without having participated in the underlying proceeding, Mid Atlantic filed a petition for reconsideration of the *Report and Order*² in the proceeding, in which the Commission deleted Channel 252A from Charles Town, West Virginia and allotted Channel 252A to Stephens City, Virginia as that community's first local aural transmission service, and modified the license of WKSI-FM to reflect the change of community. Now, months after the deadline for filing a petition for reconsideration, Mid Atlantic wishes the Commission to consider its "supplement" to that petition. However, the Commission is statutorily barred from doing so. Moreover, the substance of Mid Atlantic's "supplement" is

¹ Mid Atlantic's Petition for Reconsideration was filed on December 5, 2003 and published in the Federal Register on January 6, 2004. 69 FR 659

² DA 03-3338, 18 FCC Rcd 22038 (2003)

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irrelevant to a decision in this case. Accordingly, Mid Atlantic's motion should be denied and its supplement should not be considered.

2. The Communications Act requires that a petition to deny of any action be filed within 30 days after public notice of the action. 47 U.S.C. § 405. Accordingly, a petition for reconsideration *and any supplement thereto* must be filed within the requisite 30 days. 47 C.F.R. § 1.429(d) (emphasis added). The Commission is without power to waive the 30-day time limit. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 18 FCC Rcd 7615 (2003). But if the Commission permitted a party to follow up its petition for reconsideration with untimely supplements at will, this time limit would be rendered a nullity. Accordingly, the Commission cannot accept a supplement unless the petitioner demonstrates adequate grounds for its consideration. *See 21st Century Telesis Joint Venture*, 16 FCC Rcd 17257, 17263 (2001), *aff'd*, 318 F.3d 192 (D.C. Cir. 2003).

3. Mid Atlantic does not even attempt to demonstrate why the Commission should accept the supplement. Mid Atlantic did not accompany its supplement with a separate motion for its acceptance, as the Commission's procedural rules require. *See* 47 C.F.R. § 1.429(d). Indeed, Mid Atlantic has repeatedly ignored the Commission's procedural rules – first, by filing a petition for reconsideration without participating in the proceeding below or demonstrating why it could not have participated below, second, by filing an unauthorized and untimely supplement, and third, by failing to file a separate motion. Its contempt for the Commission's orderly processes should result in the dismissal of its petition and of its supplement.

4. Turning to the substance of the supplement, Mid Atlantic argues that the Commission should apply a "hard look" analysis to the proceeding below, and cites a speech by Commissioner Abernathy in support of its argument. But this argument is frivolous. A "hard

look” analysis can be applied, if at all, to an assignment or transfer of a broadcast license. *See* Mid Atlantic’s Attachment 1 (“deals resulting in high levels of consolidation are going to get an extra hard look . . .”). This is a proceeding to amend the FM Table of Allotments, not an assignment or transfer proceeding or any other kind of “deal.” The issues before the Commission in this proceeding arise under Section 307(b) of the Communications Act, which requires the Commission to ensure that broadcast stations are allotted fairly and equitably to the various communities. *See* 47 U.S.C. § 307(b). Mid Atlantic has taken the “hard look” concept completely out of context.

5. Moreover, even if the Commission did intend to apply a new policy to FM allotment proceedings, it cannot reopen old proceedings and apply new policies to them. Yet that is what Mid Atlantic is requesting here. More than four months after the Commission issued the *Report and Order*, Mid Atlantic now requests reconsideration of that *Report and Order* based on a “new” policy. This is not permissible under the statute or the Commission’s rules of procedure.

WHEREFORE, for the foregoing reasons, the Commission should deny Mid Atlantic’s motion and should not consider its supplement.

Respectfully submitted,

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March 22, 2004

CERTIFICATE OF SERVICE

I, Scott Woodworth, hereby certify that on this 22nd day of March, 2004, a copy of the foregoing "Opposition to Motion" was sent via first-class mail, postage prepaid, to the following:

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